June 21, 2019

Via ECFS

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks*; WC Docket No. 18-141

Dear Ms. Dortch:

Please find attached a declaration from Harold Furchtgott-Roth, a former Commissioner of the Federal Communications Commission ("FCC") and a former principal staff member working on legislation that became the Telecommunications Act of 1996. Relevant to the relief sought in USTelecom's Petition for Forbearance,[1] Mr. Furchtgott-Roth concludes the following:

- The 1996 Act favored competition over regulation;
- In particular, Sections 10 and 11 of the Act were meant to enforce the Act's deregulatory purposes, forcing the removal of regulation as competition advances;
- The structure of telecommunications regulation under the 1996 Act was not designed to be permanent;
- Competition in the provision of retail telecommunications has advanced well beyond what was imagined in 1996, and warrants forbearance from ILEC-specific unbundling and resale obligations; and
- The alleged needs of specific competitors do not justify a denial of forbearance; Section 10 is concerned with whether regulation is necessary, not how particular competitors will fare as regulation is eliminated.

Please direct any questions to the undersigned.

Sincerely,

/s/ Patrick R. Halley
Patrick R. Halley
Senior Vice President, Policy & Advocacy
USTelecom – The Broadband Association

[1] Petition for Forbearance of USTelecom – The Broadband Association, WC Docket No. 18-141 (filed May 4, 2018) ("Petition").

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	**)**	
	)	
Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next- Generation Networks	**)**	**WC Docket No. 18-141**

Declaration of Harold Furchtgott-Roth*

June 21, 2019

*President, Furchtgott-Roth Economic Enterprises, Washington, DC. I gratefully acknowledge support from USTelecom to underwrite part of this declaration. The views expressed, and any errors in those views, are those of the author alone.

I. INTRODUCTION AND SUMMARY

Section 10 of the Communications Act of 1934 (the "Act"),[1] a provision that was added by the Telecommunications Act of 1996, permits a telecommunications carrier, or group of telecommunications carriers, to petition the Commission to "forbear" from enforcing a section of the Act or regulations promulgated under the Act. In May 2018, USTelecom filed with the Commission a Section 10 petition for forbearance[2] with respect to various statutory provisions and rules. Still pending before the Commission is USTelecom's request for nationwide forbearance from Section 251(c)(3) and (4) and associated requirements under Sections 251 and 252, which impose unbundled network element ("UNE") and resale obligations on incumbent local exchange carriers ("ILECs").

As a former FCC Commissioner and as a former principal staff member working on legislation that became the Telecommunications Act of 1996, I have been asked by USTelecom to comment on the historical background of the concepts of competition and deregulation under the Telecommunications Act of 1996 in general and under Section 10 in particular. In addition, USTelecom has asked me to comment on issues pertaining to its pending Petition.

Based on my training and experience as an economist; based on my experience as chief economist for the House Commerce Committee and as Commissioner of the Federal Communications Commission; and based on my review of the record, my conclusions are as follows:

- The 1996 Act favored competition over regulation;
- In particular, Sections 10 and 11 of the Act were meant to enforce the Act's

[1] 47 U.S.C. 160.
[2] Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next Generation Networks, WC Docket No. 18-141, May 4, 2018. ("Petition").

deregulatory purposes, forcing the removal of regulation as competition advances;

- The structure of telecommunications regulation under the 1996 Act was not designed to be permanent;

- Competition in the provision of retail telecommunications has advanced well beyond what was imagined in 1996, and warrants forbearance from ILEC-specific unbundling and resale obligations; and

- The alleged needs of specific competitors do not justify a denial of forbearance; Section 10 is concerned with whether regulation is necessary, not how particular competitors will fare as regulation is eliminated.

II. THE DEREGULATORY FOCUS OF THE 1996 ACT

As a participant in the process leading the 1996 Act, I would like to address the Act's general deregulatory approach, particularly in connection with Section 10 – the forbearance provision – and the closely related Section 11.

A. THE 1996 ACT FAVORED COMPETITION OVER REGULATION

S. 652, the legislation that would become the Telecommunications Act of 1996, was approved by the House of Representatives on February 1, 1996 by a vote of 414-16; it passed the Senate on the same day by a vote of 91-6.[3] It was signed into law by President Clinton on February 8, 1996 at the Library of Congress. At a time when the federal government was deeply divided over partisan issues, the Telecommunications Act of 1996 was neither partisan nor divisive. Despite pervasive political confrontation elsewhere in Washington, Congress found a way in 1996 to do something it had not done for 62 years: pass major legislation that would become new communications law. And it passed not along partisan lines but by nearly unanimous votes.

[3] Congress.gov, at https://www.congress.gov/bill/104th-congress/senate-bill/652/all-actions?overview=closed#tabs.

Starting with its very first sentence, the Telecommunications Act of 1996 was designed to promote reliance on competitive markets, not regulation, in advancing consumers' interests. The legislation's preamble calls it "An Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[4] The preamble's two verb phrases—promote competition and reduce regulation—were tied together, ungrammatically, in a single infinitive as if they were one verb phrase. Only in the context of the Telecommunications Act of 1996 is the phrase "promote competition and reduce regulation" a single verb worthy of a single infinitive. In opening with this conjunction of two verb phrases--"promote competition" and "reduce regulation"—the Act makes clear that the two concepts of inseparable. They were tied together, and they complemented one another.

Competition and *deregulation* were both common and central concepts in the Act. The Act employed various forms of the word *competition* some 61 times. Entire sections of the new law were dedicated to reducing regulation, including not only Section 10[5] and Section 11,[6] discussed below, but also Section 257,[7] and Section 202[8] on media ownership. More generally, the structure of the Act was designed to impose regulation only where it was deemed necessary at the time. To that end, the 1996 Act differentiated between information services, which it exempted from almost all regulation, from traditional common carrier telecommunications services, which were subject to public utility-style regulation. Even within the class of telecommunications carriers, the 1996 Act was careful to establish regulatory tiers, such that

[4] Telecommunications Act of 1996, Preamble.
[5] 47 U.S.C. 160.
[6] 47 U.S.C. 161.
[7] 47 U.S.C. 257.
[8] Telecommunications Act of 1996, Section 202(h).

only "local exchange carriers" were subject to certain kinds of regulations, and only ILECs were subject to the most intrusive regulations.

B. IN PARTICULAR, SECTIONS 10 AND 11 OF THE ACT WERE MEANT TO ENFORCE THE ACT'S DEREGULATORY PURPOSES, FORCING THE REMOVAL OF REGULATION AS COMPETITION ADVANCES

Two provisions of the 1996 Act – Sections 10 and 11 – were in particular dedicated to deregulation of telecommunications services as competition and other forces rendered existing mandates unnecessary. Section 10 originated in the Senate, while Section 11 originated in the House of Representatives. The conference committee for S652 kept *both* sections, not because they were redundant, but precisely because they were not. In their most straightforward application, the two provisions complemented each other. Each provision called for deregulation as a result of competition: Section 11 requires review of all regulations affecting providers of telecommunications, and the elimination of unnecessary regulations, to be undertaken every two years.[9] Section 10 is based on action taken on the FCC's own initiative or a petition from telecommunications providers to deregulate where competition is anticipated or already present, and allows the elimination of regulations or statutory requirements.

Although the current proceeding involves a Section 10 forbearance petition, I believe that it is essential in the Commission's evaluation of a Section 10 petition to understand the duties

[9] Section 11 states:
(a) Biennial review of regulations
In every even-numbered year (beginning with 1998), the Commission— (1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.
(b) Effect of determination
The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.

and responsibilities of the Commission under Section 11. That provision requires biannual review of *all* regulations affecting telecommunications services and the removal of those no longer necessary in the public interest as a result of competition. The Commission has never fully applied Section 11,[10] but that provision was meant to require the agency to receive comments on all rules every other year, and to determine the state of competition for telecommunications providers for each such rule. The statute could not be clearer in this regard: "[T]he Commission shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service," and "shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."[11] I am not aware that the Commission sent out for public comment analyses of "meaningful economic competition between providers of such [telecommunications] service" for specific markets under Section 11.[12] Such analyses are, however, the predicate for deregulation under

[10] The FCC has sent out public notices in some, but not all, required years. The Commission failed entirely to apply Section 11 in 2014. *See* statement of then-Commissioner Ajit Pai in PN 16-149, *Commission Seeks Public Comment in 2016 Biennial Review of Telecommunication Regulations,* CG Docket No. 16-124, EB Docket No. 16-120, IB Docket No. 16-131, ET Docket No. 16-127, November 3, 2016; PS Docket No. 16-128, WT Docket No. 16-138, WC Docket No. 16-132. Even when the Commission has issued such notices, it has sought comment only on some, not all, rules. My personal understanding is that, in many instances, the manner in which the Commission has handled Section 11 has indicated little interest in receiving comments.

[11] Section 11.

[12] Competition is an economic concept for a market. A market is defined for a specific product or service in a specific geographic area. The contours of markets—services offered, geographic scope, and competitors—change over time. In a competitive market, prices and quality of services are disciplined by competition. A provider of telecommunications services could provide those services at combinations of prices and quality no less attractive to customers than those offered by competitors. In a non-competitive market, a provider could profitably charge a combination of prices and quality of service that is less attractive to customers than would obtain in a competitive market.

Section 11. The fact that the Commission has not conducted these reviews is relevant in the Section 10 context, because it effectively places on the Section 10 petitioner the burden of developing and producing marketplace data that the FCC should have collected itself in the context of the most recent Section 11 review.

Under Section 10, of course, a telecommunications carrier, or group of telecommunications carriers, may petition the Commission to forbear from a regulation or section of the Act.[13] To grant a forbearance petition, the Commission must make three findings:

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.[14]

Section 10 provides for a specific interpretation of the "public interest" that is tied directly to competition in the future:

> In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.[15]

As written by Congress, the two provisions would work in tandem. Section 10 petitions for forbearance would be considered alongside the catalog of information that the Commission

[13] 47 U.S.C. 160.
[14] 47 U.S.C. 160(a).
[15] 47 U.S.C. 160(b).

would possess as a result of prior Section 11 evaluations. For a petition filed in 2018, the Commission in theory would have already compiled at least 10 biennial reviews[16] under Section 11, each containing the following: (1) the documented reviews of the state of competition among providers of telecommunications services in *every* telecommunications market; (2) the documented review of *all* regulations affecting providers of telecommunications services; and (3) the documented determination of which of those rules are no longer necessary in the public interest as the result of competition.

C. THE STRUCTURE OF TELECOMMUNICATIONS REGULATION UNDER THE TELECOMMUNICATIONS ACT OF 1996 WAS NOT DESIGNED TO BE PERMANENT

Congress designed the Telecommunications Act of 1996 to ensure that regulation would be removed as competition evolved. As detailed above, the Act included not one, but two, sections specifically designed to remove regulations – and entire statutory provisions – as they ceased to be necessary. Section 11 applies to *all* regulations affecting providers of telecommunications services. Section 10 applies to all regulations as well as all statutory provisions.[17]

The reason for the impermanence of regulation under the Telecommunications Act of 1996 is that competition, not regulation, is the greatest friend of the American consumer. As courts and economists have long recognized, competition, not regulation, offers the American consumer better services at lower prices. Over the past 23 years, the quality and variety of telecommunications services in the United States has exploded; prices have fallen, and the

[16] The Commission should have catalogs of complete results of Section 11 reviews for 1998, 2000, 2002, 2004, 2006, 2008, 2010, 2012, 2014, 2016, and possibly 2018.
[17] Section 10 states that the FCC may not forbear from the requirements of section 251(c) or 271 until it determines that those requirements have been fully implemented. The Commission has held that both provisions have been fully implemented.

American consumer is much better off. Under the 1996 Act, the elimination of regulation via forbearance (or via the Section 11 process) does not indicate that the regulation at issue has failed, but that legislation's core goal – the development of competition that renders regulation unnecessary – has been realized. In other words, forbearance from regulation under Section 10 is one of the greatest possible achievements of government: a recognition that consumers have won and no longer need government regulations.

The regulations in question here, involving ILEC unbundling and resale mandates, fall firmly within the class that Congress hoped would be temporary, falling away once retail competition had arrived. These ILEC-specific requirements are among the most expansive regulations ever imposed on communications providers. They were warranted in 1996 (at least in some cases) by the need to break open what had, until then, been state-sponsored monopolies, and by ILECs' unique market status. But Congress did not enshrine permanent rules for any carriers including ILECs. Instead, Congress provided a regular and predictable means for the Commission to end ILEC-specific rules once the ILECs' dominance faded. As detailed in the record and addressed below, that time has come.

III. APPLICATION: THE COMMISSION SHOULD GRANT THE USTELECOM PETITION'S REMAINING REQUESTS

The discussion above explains the deregulatory, pro-competition policies that formed the basis for the 1996 Act, and in particular that Act's expectation that Sections 10 and 11 would be used to ensure that regulation would be eliminated as competition grew. In this section I describe my understanding of competition in the markets relevant to USTelecom's forbearance request, and then discuss the implications of that competition for what I understand to be key outstanding issues. I conclude in particular: (1) competition in the retail telecommunications

markets has advanced well beyond what could have been envisioned by those who drafted the Telecommunications Act of 1996, to a point that clearly warrants removal of unbundling and ILEC-specific resale obligations; and (2) the Commission should reject arguments based on the alleged needs of specific competitors, given the abundant evidence that efficient providers are able to compete against ILECs without any reliance on these mandates.

A. COMPETITION IN THE PROVISION OF RETAIL TELECOMMUNICATIONS HAS ADVANCED WELL BEYOND WHAT WAS IMAGINED IN 1996, AND WARRANTS FORBEARANCE FROM ILEC-SPECIFIC UNBUNDLING AND RESALE OBLIGATIONS

As discussed in the Petition, the United States has substantial competition for communications services, and that competition has increased substantially in the past two decades. During that time, the United States shifted from a country where the vast majority of households had only switched, wireline voice service provided by an ILEC to a country where the vast majority of households and individuals use many different forms of telecommunications services and have choices for countless more and where barely 10 percent of households have any form of ILEC switched-access wireline service. Meanwhile, cable providers have moved from offering linear video programming almost exclusively to being leading providers of voice and data services, as well as strong competitors in the provision of business-grade and wholesale data transport. Currently, cable providers offer 25/3 Mbps broadband service to the vast majority of American households. Wireless services have evolved from a niche market in 1996 to a service with hundreds of millions of subscribers. The economic distinctions between wireline and wireless telecommunications blurred years ago as consumers switched between them seamlessly. Online and virtual service providers, that do not rely on regulation based on Sections 251 and 252, compete against facilities-based providers.

The vast majority of American consumers benefit from the competition for telecommunications services today. Any effort by a provider to raise prices above the competitive level or to reduce quality of service would be unprofitable. The future holds even more competition as new technologies and new competitors seek to enter the vibrant American telecommunications market. I suspect that few of the individuals who voted for the Telecommunications Act of 1996 would have imagined such an outcome in less than a generation possible.

As stunning as has been the decline of switched, wireline voice service provided by ILECs, the explosive changes in consumer demand for communications services, and the choices available to consumers, have been even more dramatic. Consumers today have choices of multiple devices to connect to multiple networks with multiple software applications to reach people around the world. Communications markets are rapidly evolving in many different directions. I recently wrote a paper suggesting that separate definitions for wireline and wireless communications markets make little sense today, with the vast majority of traffic for wireless handsets travelling over WiFi and land-based networks.[18] There is little doubt that most Americans have a wide range of valuable and expanding choices for communications services.

Facilities-based competition does not depend on Section 251. Consumers spend far more on wireless than on wireline telecommunications services. The wireless service providers do not rely on Section 251. Consumers get online via a cable broadband connection far more often than over ILEC-provisioned broadband. Cable providers do not rely on Section 251. Moreover, as the Commission recently held in its Business Data Services rulemaking, competition for

[18] H. Furchtgott-Roth, "WIFI Helps Define the Relevant Market for Wireless Services," SSRN.com, October 25, 2018. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3260271.

transport offerings is robust nationwide, both on intracity and inter-city routes. Cable providers and independent fiber companies aggressively advertise the availability of their transmission services, including transmission to end-user locations. And although not a precondition for relief from regulation under either Section 10 or Section 11, resold services of all types are competitively available in much of the United States. Tracfone, for example, is a wireless reseller that resells wireless services from AT&T, Verizon, T-Mobile, and Sprint without relying on government regulation or Section 251(c)(4). All of this resale service is made available in the absence of regulatory mandates.

It would be difficult to review markets for telecommunications services available to the vast majority of Americans and not conclude: (a) most telecommunications markets have been and continue to be competitive; (b) telecommunications competition is primarily based on new technologies and new competitors, and only very rarely based on use of services and network facilities provisioned as the result of a regulatory mandate; and (c) rules mandating network unbundling and ILEC-specific resale requirements are no longer necessary to ensure that consumers' interests are met.

These are exactly the anticipated circumstances that led Congress to adopt Section 10 – *i.e.*, circumstances in which competition has arrived, and rendered several statutory provisions unnecessary. Given rampant competition in the retail market serving the vast majority of Americans, continued application of ILEC-specific unbundling and resale requirements are not necessary to ensure that rates and terms are just and reasonable and nondiscriminatory, not necessary to protect consumers, and not consistent with the public interest. Consumers facing competition would benefit from forbearance from these obligations, which would promote deployment of newer and better network facilities by ILECs and their competitors alike.

B. THE ALLEGED NEEDS OF SPECIFIC COMPETITORS DO NOT JUSTIFY A DENIAL OF FORBEARANCE; SECTION 10 IS CONCERNED WITH WHETHER REGULATION IS NECESSARY, NOT HOW PARTICULAR COMPETITORS WILL FARE AS REGULATION IS ELIMINATED

I understand that a handful of commenters are opposing the Petition on the ground that their particular business models rely on regulations requiring unbundled network elements or resale.

The Commission should view these comments through a statutory lens. The statutory standard under Section 10, and the economic standard generally, is *competition*—a concept that will vary by specific market. A competitive market is not one in which every business necessarily survives and thrives with every change in market condition; a competitive market is the opposite. A competitive market is one in which no firm could profitably raise prices or reduce quality of service because competitors would continue to provide services at competitive prices. The statutory standard the Commission must consider under Section 10 is competition in the market with forbearance from regulation. Section 10 does not provide for the Commission to consider the effect on forbearance on individual firms as long as the market is competitive.

In summary, then, the question before the FCC is not "is there any firm that might be harmed if the Commission grants forbearance," but rather "will consumers be harmed if the Commission grants forbearance." For markets serving the vast majority of Americans, the answer is "no."

IV. CONCLUSION

The vast majority of America today has substantial competition in the provision of telecommunications services. If that competition is insufficient to meet the statutory requirements demanded by Congress to forbear from many forms of regulation under the

Telecommunications Act of 1996, it is difficult to imagine what additional competition would be necessary. The USTelecom Petition presents the Commission with an opportunity to declare victory for most American consumers in the quest for better telecommunications services at lower prices. That victory has come from competition, largely spurred by new technologies and new competitors. The Telecommunications Act of 1996 commands the Commission to forbear from regulation that is no longer necessary as a result of such competition. Most Americans already enjoy that competition. The time to declare victory is past due.